COURT OF APPEALS DECISION DATED AND RELEASED

June 3, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3682-CR

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARD L. BEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Bernard Beyer appeals a judgment convicting him of one count of receiving stolen property as a repeater. He was sentenced to twelve years in prison, with ninety-six days of presentence credit. Beyer argues that he did not admit his repeater status and the State failed to prove the time that

he spent in "actual confinement." He argues, therefore, that his sentence should be reduced to ten years. We affirm the judgment and sentence.

A defendant charged as a repeater is subject to an enhanced penalty under § 939.62(1), STATS. A repeater is defined as one who "was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced" and time "spent in actual confinement serving a criminal sentence shall be excluded." Section 939.62(2), STATS. The prior convictions must be admitted by the defendant or proved by the State. Section 973.12(1), STATS. When the State is put on notice that a defendant does not admit to the habitual criminality allegation, it must provide proof beyond a reasonable doubt of the defendant's repeater status. *State v. Theriault*, 187 Wis.2d 125, 127, 522 N.W.2d 254, 255 (Ct. App. 1994).

An "official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported." Section 973.12(1), STATS. A presentence report can qualify as an official report within the meaning of the statute if it included the date of conviction for the prior offense. *State v. Goldstein,* 182 Wis.2d 251, 257, 513 N.W.2d 631, 634 (Ct. App. 1994). "Any sentence so reported shall be deemed prima facie to have been fully served in actual confinement or to have been served for such period of time as is shown or is consistent with the report." Section 973.12(1), STATS. The issue whether the trial court correctly applied the statutory penalty enhancer is a question of law we review de novo. *Theriault,* 187 Wis.2d at 131, 522 N.W.2d at 257.

On July 7, 1995, Beyer was charged with the instant offense of receiving stolen property between October 1993 and July 19, 1994. After a

two-day trial, the jury found him guilty as charged. The trial court observed that the computerized printout of a teletype "of the kind we commonly see in these matters from the Wisconsin Crime Information Bureau" indicated that Beyer was received at the Dodge Correctional Institution on April 2, 1986, and paroled on February 12, 1990. A copy of the conviction indicating a seven-year prison sentence was also offered.\(^1\) The record also contains Beyer's presentence report, which states that on March 31, 1986, Beyer was sentenced to seven years in prison for a second-degree sexual assault conviction. It states that on February 12, 1990, Beyer was paroled and, on March 21, 1993, he was discharged from parole. Beyer offered no evidence to rebut this information and stated that from what he recalled, the information was accurate. The trial court concluded that Beyer was subject to the penalty enhancement of \(\frac{8}{2}\) 939.62, STATS., because he was confined from the date of conviction to February 12, 1990.

We conclude that the trial court correctly applied the statute. At the outset, we observe that the State concedes that Beyer did not admit his repeater status and that the State was therefore required to prove it. We conclude that the State met its burden through the exhibits of the CIB printout and the presentence report. Based upon the CIB printout and the presentence report, the trial court was entitled to find that Beyer was confined until February 12, 1990. Because the period in actual confinement is not considered under § 939.62(2), STATS., less than five years elapsed from the date of Beyer's 1986 second-degree sexual assault conviction and July 19, 1994, the latest date that he could have committed the receiving stolen property offense.

¹ The exhibits were not made part of the record, but photocopies were attached as part of appellant's appendix and not refuted by the State. *See Charolais Breeding Ranches Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

Beyer concedes that the CIB teletype is prima facie evidence of his prior conviction and sentence. He argues, however, that the reference in the teletype with respect to the date of reception at Dodge and the date of parole were insufficient to prove actual confinement. We disagree. The teletype and presentence reports were sufficient to prove that Beyer was actually confined between the dates of his reception and the date of release on parole. *See* § 973.12, STATS.

Beyer's reliance on *State v. Zimmerman*, 185 Wis.2d 549, 518 N.W.2d 303 (Ct. App. 1994), is misplaced. In *Zimmerman*, "[t]he only evidence offered by the State was its allegation in the criminal information, which charged that Zimmerman was previously convicted of a felony in Texas 'on or about 11-09-83 being released on 3-28-91." *Id.* at 557-58, 518 N.W.2d at 306. We rejected the information as sufficient proof of actual time spent incarcerated and observed that merely the date of conviction and release did not take into account whether Zimmerman was ever placed on probation or parole. *Id.* at 558, 518 N.W.2d at 306.

Zimmerman is not dispositive. Here the presentence report and judgment of conviction state that Beyer received a seven-year prison sentence. The CIB printout states the date of reception at the correctional facility and the date of release on parole. Beyer argues that we cannot consider the CIB printout and the presentence report because these were never formally received into evidence. Even though the rules of evidence generally do not apply at sentencing, see § 911.01(4)(c), STATS., the legislature through § 973.12(1), STATS., has reintroduced a degree of formal proof requirements as to repeater allegations. State v. Koeppen, 195 Wis.2d 117, 131, 536 N.W.2d 386, 391 (Ct. App. 1995). Because the parties agree the exhibits were offered and considered by the court,

this is not a case where there was a complete failure of substantive proof in support of the enhanced repeater allegation. *See id.* We are satisfied that the trial court correctly applied the repeater provision of § 939.62, STATS.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.